S2867

No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSE ANGEL LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the denial of Appellant's Motion in Limine at trial allowing evidence of payment for transportation as upheld by the Tenth Circuit Court of Appeals constitutes a variance as related to the Amended Indictment and was said decision by the Tenth Circuit in conflict with this Court's holdings in *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) and the decisions of other Circuit Courts and should this Court reconcile the rulings between these Circuit Courts?

LIST OF PARTIES

All parties to this action are named in the caption.

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OPINIONS BELOW

The judgment for which certiorari is sought is the Tenth Circuit Court of Appeals' opinion in *United States of America v. Lopez*, 06-6353 filed on July 26, 2007, and included in the Appendix as Exhibit 2.

JURISDICTIONAL STATEMENT

A. The Tenth Circuit Court of Appeals denied Petitioner's appeal of his judgment and sentence from the United States District Court for the Western District of Oklahoma on July 26, 2007.

B. This Petition for Writ of Certiorari is timely brought as per this Court's Rule 13.1.

C. This Court's jurisdiction arises pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use without just compensation.

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1324(a)(1)(A)(ii), Transporting Illegal Aliens, and Aiding and Abetting:

(1)(A) Any person who –

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law; . . . or

(II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B).

* * *

8 U.S.C. §1324(a)(1)(B)(i), Punishment:

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs –

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

* * *

8 U.S.C. §1324(a)(1)(B)(ii), Punishment:

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;

* * *

18 U.S.C. §2 Principals:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

A. Procedural History and Facts of the Crime.

Defendant/Appellant was originally charged May 17, 2006 by indictment with eight counts of Transporting Illegal Aliens for private financial gain in violation of 8 U.S.C. §1324(a)(1)(A)(ii), 8 U.S.C. §1324(a)(1)(B)(i) and 18 U.S.C. §2. Subsequent thereto on June 20, 2006 a Superseding Indictment was filed modifying the charges to eight counts of Transporting Illegal Aliens (omitting for private financial gain) in Violation of 8 U.S.C. §1324(a)(1)(A)(ii), 8 U.S.C. §1324(a)(1)(B)(ii) and 18 U.S.C. §2. Defendant was found guilty of all counts at a jury trial on July 21, 2006 and was subsequently sentenced on October 30, 2006 to 30-month terms on all counts to run concurrently. He was also sentenced to three years supervised release on all counts to run concurrently. A motion for extension of time to file Notice of Appeal and Brief in Support (Doc. 170) was filed by trial counsel on November 1, 2006 and granted by Order of the Court on November 3, 2006 (Doc. 176). Defendant timely filed his notice of appeal on November 30, 2006. The conviction was affirmed on June 26, 2007 and Petitioner now submits his request for Certiorari to this Court.

Defendant was charged with eight counts of Transporting Illegal Aliens, to-wit Ana Maria Cassillas Perez, Nolbia Basilia Gabon, Jose Basilic Gonzales-Cerro, Hugo Evodio Olivaris-Martinez, Miguel Angel Jarquin Ogema, Jesus Chimal-Sanchez, Miguel Laris-Salas and Carmelita Cores-Aragon. These individuals were transported by various means to a location in Los Angeles, California where they boarded a van. Said van was driven by Defendant and his finace Brandy Beverly from Los Angeles to Las Vegas and other locations ending in North Enid, Oklahoma. On April 26, 2006 in North Enid, Oklahoma the van currently being driven by Brandy Beverly was stopped for speeding in a school zone by Chief Martin Schubert of the North Enid Police Department. (Trial Transcript (hereinafter TT)). P. 32-33) When he asked Ms. Beverly to see her driver's license she replied she did not have a driver's license. (TT. P. 35, L. 6). He inquired if anyone else had a driver's license and the Defendant responded he had a California Driver's License. (TT. P. 37, L. 25). When asked for identification the Defendant handed him a copy of a birth certificate. (TT. P. 38, L. 15). Chief Schubert had his dispatcher run a check on the Driver's License and was informed it had been expired for several years (TT. P. 39, L. 19). Chief Schubert further determined that the van was registered to Raul Torres (TT. P. 41, L. 7). Chief Schubert asked Brandy Beverly where they were going and she said to Oklahoma City to work. (TT. P. 44, L. 5). Schubert asked Ms. Beverly if the passengers in the van were here legally and she said no. (TT. P. 45, L. 18-20).

Defendant also told Schubert that they were going to Oklahoma City to work and had come from Colorado. (TT. P. 45-46, L. 25-1). Schubert also asked Defendant if the passengers in the van were in the United States legally and he replied they were not. (TT. P. 46, L. 9-12). Schubert arrested Ms. Beverly and placed her in his car. (TT. P. 48, L. 4-9). Schubert had advised ICE and upon a call back was instructed to detain everyone. (TT. P. 51, L. 23-24). Everyone was escorted to the local city hall and Lopez posted bond for Ms. Beverly related to the arrest for driving without a valid license and speeding. They were all detained at the request of Agent Munoz of ICE and were subsequently transported to Oklahoma City for questioning where it was determined that passengers in the van were escorted by various means to a van in Los Angeles, California for transportation to various locations in the United States. In return for this they each were charged the rate of $600. Said fee was not paid to Mr. Lopez nor Ms. Beverly but was to be paid by friends or relatives upon arrival at their destination.

B. Facts Material to the Question Presented and How the Issue Was Raised and Decided Below.

Defendant/Appellant asserts that his right to a fair trial was prejudiced by the partial denial of trial counsel's Motion in Limine (Trial Court Record, Doc. 85, Order, Doc. 107) as it related to evidence of payment for transportation. Defendant asserts that such

evidence acted as a variance of the superseding indictment in that evidence of payment introduced the element of transporting illegal aliens for private gain which was not the crime he was charged with. Defendant further asserts that the possibility of variance by the Court's failure to exclude various business cards related to various transportation businesses as they would be evidence that Defendant was engaged in transporting aliens for private financial gain which was not what he was charged with and had no part of the res gestae of the crime. Defendant/Appellant further asserts that evidence that each of the persons transported were being charged for said trip, even though there was no evidence that said money was collected by Defendant implied that he was engaged in the transportation for private financial gain which was not a part of the res gestae of the crime.

REASONS FOR GRANTING THE WRIT

The Court should grant review as the Circuit Court's analysis as to admission of evidence relating to payment constitutes a variance and such decision is in conflict with this Court's rulings in *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) and is divergent from the application of the doctrine of variance in other circuits.

This Court analyzed the issue as to how to apply the doctrine of variance in *United States v. Miller*,

471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). The Trial Court granted Defendant's Motion in Limine in part but allowed testimony of the witnesses that they were charged for the trip. Defendant argued in the Trial Court and on appeal to the Tenth Circuit that evidence of payment has no probative value and can only serve to prejudice the jury. Defendant further asserts that introduction of the business cards which purportedly represented transportation businesses over Defendant's objection was error in that it was evidence of transportation for private gain which was not the crime for which Defendant was charged. Petitioner asserts that these issues act as a variance to the indictment which prejudiced his right to a fair trial as the evidence presented tended to broaden what he was charged with.

The Circuit Court's ruling below holding that a variance did not occur is in contradiction to other Circuits' holdings in similar cases. Some courts apply the prejudicial per se approach to variances. *United States v. Somers*, 496 F.2d 723, 744 (3d Cir. 1974). The Court in *United States v. Beeler*, 587 F.2d 340, 342 (6th Cir. 1978) in considering the prejudicial per se rule distinguished between variances and amendments. The Court in that case held that:

> A variance occurs when the proof introduced at trial differs materially from the facts alleged in the indictment. In contrast, an amendment involves a change, whether literal or in effect, in the terms of the indictment. Amendments have been held to be

> prejudicial Per se while variances may be subject to the harmless error rule. *Gaither v. United States*, 134 U.S.App.D.C. 154, 413 F.2d 1061 (1969); *United States v. DeCavalcante*, 440 F.2d 1264 (3d Cir. 1971). Variances which create "a substantial likelihood" that a defendant may have been "convicted of an offense other than that charged by the grand jury" constitute constructive amendments. Courts apply the prejudicial Per se approach to such variances. *United States v. Somers*, 496 F.2d 723, 744 (3d Cir. 1974).

In a similar ruling the Tenth Circuit has adopted the doctrine of a simple variance and distinguished it from fatal variances. In *U.S. v. Williamson*, 53 F.3d 1500, 1513 (10th Cir. 1995) the court discussed the differences when it said:

> But when the variance rises to the level of a "fatal" variance, relief is appropriate. See *Hunter*, 916 F.2d at 598-99. "A variance 'is fatal only when the defendant is prejudiced in his defense because he cannot anticipate from the indictment what evidence will be presented against him or is exposed to the risk of double jeopardy.'" *Haddock*, 956 F.2d at 1548 (quoting *Hunter*, 916 F.2d at 599).

Petitioner submits that the Circuit's interpretation and application to this case is in error and further that it is in contrast to decisions of similar cases in other circuits. "Ever since *Ex Parte Bain* was decided in 1887, it has been the rule that after an indictment has been returned its charges may not be

broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-16, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (internal citation omitted). Therefore, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Id.* The Fifth Circuit Court of Appeals has held that "a constructive amendment of the indictment is a reversible error per se if there has been a modification at trial of the elements of the crime charged." See *United States v. Salinas*, 601 F.2d 1279, 1290 (5th Cir. 1979). The amendment need not be explicit to constitute reversible error, but may be implicit or constructive. This occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. *United States v. Baytank*, 934 F.2d 599, 606 (5th Cir. 1991). Constructive amendment requires reversal of the conviction. *Id.* Moreover, it is clear that the indictment may be amended constructively by the actions of either the court or the prosecutor. *Salinas*, 654 F.2d at 324.

"The misconstruction of an indictment is reversible error if it is possible that the defendant was tried for a crime other than that alleged in the indictment." See *United States v. Ylda*, 653 F.2d 912, 914 (5th Cir. Unit A Aug.1981). Simply because the facts leading to the conviction arose out of the same incident does not mean that the defendant was not impermissibly convicted of a separate crime. In *United States v. Salinas*, 654 F.2d 319, 324 (5th Cir. Unit A Aug.1981),

the court reversed a conviction even though the defendant had been convicted for the same act for which he had been indicted. Still, because the jury charge allowed a conviction for committing that act in a manner different from that alleged in the indictment, they found a constructive amendment. In the *Salinas* indictment, the defendant was charged with aiding and abetting a bank officer in misappropriating bank funds. During the trial, the bank officer was cleared of any connection to the defendant or to the misappropriation. But the court instructed the jury that it could convict for aiding and abetting any bank officer.

Petitioner submits that the same situation applies to this case. Petitioner was charged by amended indictment with Transportation of Illegal Aliens (not for private financial gain) in Violation of 8 U.S.C. §1324(a)(1)(A)(ii), 8 U.S.C. §1324(a)(1)(B)(ii) and 18 U.S.C. §2. This was an amendment from the original charge of Transporting Illegal Aliens for Private Financial Gain, 8 U.S.C. §1324(a)(1)(A)(ii). Defendant sought by Motion in Limine to exclude evidence of payment to comply with the amended charge, however, the Court permitted such evidence to be admitted. By allowing evidence of payment to be submitted to the jury, the Court constructively modified the indictment to the original charge. By upholding said conviction the Tenth Circuit has effectively permitted the variance in the indictment in contradiction to the rule established in *Ex parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) as extended by *Stirone, supra.*

In *Nunez v. United States,* 180 F.3d 337 (5th Cir. 1999) the court discussed a similar situation to the case at bar. In that case the Court held that

> Nuñez rightly argues that the indictment failed to charge the offense for which he was convicted. The jury instruction, without specific reference to how he resisted arrest, impermissibly broadens the indictment to include all sorts of resistance. Unlike the *Miller* indictment, Nuñez's indictment did not allege two different offenses, one of which was rejected by the trial jury. Rather, Nuñez's single-count indictment alleged a single offense: "resisting arrest by means of a firearm." This is a specific and narrow accusation, and the later jury instruction allowing conviction for "resisting arrest" is far more general and broad.

Petitioner asserts that, as in *Nunez*, the admission of testimony of payment broadened the nature of the indictment to the offense of Transportation of Illegal Aliens for Private Financial Gain and thus acted as a variance to his charge.

Petitioner asserts that the Tenth Circuit Court erred in finding that the asserted variance was only a simple variance and thus harmless error and further such findings are contrary to the guidelines in other circuits. As such said ruling should be reversed and the matter ordered remanded for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant this petition for certiorari to the United States Supreme Court on the question presented.

Respectfully submitted,

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Counsel for Petitioner

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE ANGEL LOPEZ, Defendant-Appellant.	No. 06-6353 (D.C. No. CR-06-118-01-M) (W.D. Okla.)

ORDER AND JUDGMENT*

(Filed July 26, 2007)

Before **LUCERO**, **HARTZ**, and **GORSUCH**, Circuit Judges.

Jose Lopez appeals his convictions, following a jury trial, on eight counts of transporting an illegal alien in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and

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* The case is unanimously ordered submitted without oral argument pursuant to Fed. R. App. P. 34(a)(2) and 10th Cir. R. 34.1(G). This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

(B)(ii). Lopez argues that the district court erred in admitting evidence that he was paid for the trip and that Immigrations and Customs Enforcement ("ICE") had previously allowed him a voluntary departure to Mexico. He also claims that he was prejudiced by the presence of a box under the prosecutor's table that read "OK Bomb VZB." For the reasons set forth below, we **AFFIRM.**

On April 26, 2006, Chief Martin Schubert stopped a loaded passenger van for speeding in North Enid, Oklahoma. Brandy Beverly, Lopez's girlfriend, was driving but did not have a driver's license, leading Schubert to ask if anyone else in the van had one. Lopez responded that he had a driver's license, but did not have it with him. Instead, he gave Schubert a photocopy of a California birth certificate. Both Beverly and Lopez stated that they were traveling from Colorado to Oklahoma City, and that the other passengers in the van were not in the country legally. Schubert made contact with ICE, which took Lopez, Beverly, and the passengers into custody.

Lopez was initially indicted on eight counts of transporting an illegal alien for private financial gain in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (B)(i) – a charge that carries a maximum sentence of 10 years' imprisonment. However, on June 20, 2006, a superceding indictment was filed that modified the charges to drop the financial gain element. Under 8 U.S.C. § 1324(a)(1)(B)(ii), the maximum penalty Lopez faced under these latter charges was five years' imprisonment.

Lopez filed a motion in limine seeking to exclude any evidence that he was paid by the passengers, but it was denied. Evidence was introduced at trial indicating that some of the passengers had learned of Lopez's van service from business cards, and that they intended to pay Lopez upon reaching their destinations. U.S. Border Patrol agent Manuel Zuniga testified that he had interviewed Lopez in 2005 and that Lopez was allowed a voluntary departure to Mexico after he admitted to being in the United States illegally. Towards the end of the trial, Lopez's counsel noticed a box under the prosecutor's table labeled "OK Bomb VZB," and immediately moved for a mistrial. The court denied that motion, but offered to poll the jury or provide a limiting instruction, an offer that Lopez declined. Lopez was convicted on all counts and sentenced to 30 months' imprisonment.

Lopez advances a twofold argument with respect to the evidence of payment. First, he contends that such evidence created a variance. "The ultimate questions of whether a variance existed, and whether it was fatal such that relief is required, are questions of law that we review de novo." *United States v. Williamson*, 53 F.3d 1500, 1512 (10th Cir. 1995). A variance occurs "when the evidence adduced at trial establishes facts different from those alleged in an indictment." *United States v. Windrix*, 405 F.3d 1146, 1153 (10th Cir. 2005) (quotation and citation omitted). "[A] variance, without more, will not warrant relief as long as the proof corresponds to an offense clearly

charged in the indictment because the defendant will have had notice of that charge and cannot claim prejudice." *Williamson,* 53 F.3d at 1513.

Because Lopez unambiguously had notice of the charges for which he was convicted, he is not entitled to relief. The superceding indictment included the time and place of the offense, as well as the names of the aliens and the type of vehicle in which they were traveling. As discussed below, the prosecution introduced testimony showing that Lopez was to be paid for transporting the aliens to show motive or as res gestae. Whether the evidence adduced at trial also could have supported a conviction for a crime carrying a stiffer penalty is irrelevant.

Lopez further contends that evidence of payment was inadmissible even if it did not create a variance. We review the trial court's evidentiary rulings for abuse of discretion. *United States v. Gorman,* 312 F.3d 1159, 1162 (10th Cir. 2002). Fed. R. Evid. 404(b) precludes evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." However, it allows such evidence to prove motive, knowledge, or lack of mistake. *Id.* Here, evidence that the illegal aliens planned to pay Lopez substantially inflated transportation fees was properly admitted to show Lopez's motive and his knowledge that the individuals were in the country illegally. Testimony that passengers came into contact with Lopez through business cards was properly admitted as res gestae. Moreover, because its probative value was not substantially

outweighed by its prejudicial effect, admission of this evidence did not violate Fed. R. Evid. 403.

Lopez also argues that the admission of Agent Zuniga's testimony was improper under Fed R. Crim. P. 403 and 404(b). Again, this evidence was properly admitted to show Lopez's knowledge that the individuals in the van were illegal aliens – the central issue at trial. The fact that Lopez had admitted to being an illegal alien showed that the California birth certificate he presented during the traffic stop was false, which in turn, indicates that Lopez knew he was committing a crime and was attempting to conceal his identity. Moreover, the court provided a limiting instruction directing the jury to consider evidence of Lopez's prior bad acts only for certain enumerated, permissible purposes.

Finally, Lopez claims the presence of a box labeled "OK Bomb VZB" unfairly prejudiced his defense. When a defendant objects to the presence of a courtroom item, we must first determine whether its presence was "inherently prejudicial." *Holbrook v. Flynn,* 475 U.S. 560, 570 (1986). The record before us, however, is insufficient to make this determination because we do not know whether the jurors actually saw the box. Nothing in the record indicates the size of the lettering or the orientation of the box, and Lopez declined the court's offer to poll the jurors. We will not presume facts in favor of an appellant, especially when that appellant rejected the court's invitation to establish a sufficient record. Accordingly, we must affirm the district court on this point. *Scott v.*

Hern, 216 F.3d 897, 912 (10th Cir. 2000) ("Where the record is insufficient to permit review we must affirm.").

AFFIRMED.

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge

United States District Court
Western District of Oklahoma

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	(Filed Jan. 29, 2007)
JOSE ANGEL LOPEZ	**CASE NUMBER: CR-06-00118-001-M**
	USM NUMBER: 16240-064
	Terri Coulter Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) one through eight of the Superseding Indictment, filed June 20, 2006 after a plea of not guilty.

The defendants adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count(s)
8 U.S.C. § 1324(a)(1)(A)(ii)	Transporting illegal aliens, and	April 26, 2006	1-8
8 U.S.C. § 1324(a)(1)(B)(ii)	Aiding and abetting		
18 U.S.C. § 2			

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is further ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

October 30, 2006
Date of Imposition of Judgment

/s/ Vicki Miles-LaGrange
Signature of Judge

VICKI MILES-LaGRANGE,
U.S. DISTRICT JUDGE
Name and Title of Judge

11/1/06
Date Signed

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 30 months. This consists of terms of 30 months as to each of counts 1-8, to be served concurrently with one another.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated at an FCI as close to Los Angeles as possible and with the lowest level of security as possible, if eligible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ by 12:00 noon on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ by 12:00 noon on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 1-5-~~0~~607 to CALIFORNIA CITY CORRECTIONAL CENTER at CALIFORNIA CITY CA, with a certified copy of this judgment.

_____

~~United States Marshal~~
WARDEN C DeRosa

By /s/ CD
~~Deputy Marshal~~
Bus Lieutenant C. Carpenter

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term consists of 3 years on each of counts 1-8, all such terms to run concurrently.

If not detained by the Bureau of Immigration and Customs Enforcement, or if detained and later released, within 72 hours of release, the defendant shall report in person to the probation office in the district to which the defendant is released. If the defendant is detained by the Bureau of Immigration and Customs Enforcement and returned to a foreign country, the defendant is to report within 72 hours of any

subsequent return to the United States during the period of probation.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer if the collection of such a sample is authorized pursuant to Section 3 of the DNA Analysis Backlog Elimination Act of 2000.

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record

or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

☒ The defendant is not deemed a candidate for community service.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS:	$800.00	$-0-	$-0-

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below. **Payments shall be forwarded to the U.S. Court Clerk for distribution to the victim.**

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Order	Priority or Percentage
TOTALS	$_____	$_____	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ☐ the interest requirement is waived for ☐ fine ☐ restitution.

  ☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $800.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid in full at the time of release from confinement, the defendant shall

make payments the greater of $ per month or not less than 10% of the defendant's gross monthly income as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement. Payments shall be forward to the U.S. Court Clerk for distribution to the victim(s).

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.